SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

STATUTES

MISCELLANEOUS

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1182

G. RAYMOND ARNETT, as Director of the Department of Fish and Game of the State of California,
Plaintiff and Respondent,

vs.

5 GILL NETS, etc.,
Defendant,

RAYMOND MATTZ,
Intervenor and Petitioner.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

Brief for the Respondent

STATEMENT OF THE CASE

The respondent adopts the Statement of the Case submitted by the petitioner.

SUMMARY OF ARGUMENT

The Act of June 17, 1892 (hereinafter the "1892 act") was intended to terminate the reservation status of the lower twenty miles of the Klamath River, which had formerly been known as the "Klamath River Reservation" or

the "extension" of the Hoopa Valley Indian Reservation. See 27 Stat. 52. This conclusion is apparent from the face of the 1892 act itself, since the main provisions of the act opened up the lands of the former reservation for settlement under the homestead laws. This conclusion is also apparent from the legislative history behind the act, since this history shows that Congress did not regard the area as a *de facto* reservation prior to the act's passage, and since the congressional purpose behind the act was inconsistent with a continuation of the reservation status of the area.

The matter before the U. S. Supreme Court in *Seymour v. Superintendent,* 368 U.S. 351 (1962), is distinguishable from the pending case. The clear revelations of legislative history concerning the 1892 act were not present in the 1906 act considered by the *Seymour* Court. Also, the act before the *Seymour* Court contained many references indicating that the reservation status of the southern half of the Colville Indian Reservation was to continue in effect (See 34 Stat. 80); no such references were contained in the 1892 act presently before this Court. Also, the *Seymour* Court noted that another act passed in 1892 effectively terminated the reservation status of the northern half of the Colville reservation (see 27 Stat. 62), and the latter act is similar to the 1892 act concerning the former Klamath River Reservation.

That the 1892 act was intended to discontinue the former Klamath River Reservation is also apparent from a 1909 map contained in a presidential proclamation issued that year. An 1892 map prepared by the U. S. Department of the Interior, cited by the petitioner, was prepared prior to the 1892 act, and hence is of no significance in interpreting the act. Nor are two recent federal "rulings" cited by the peti-

tioner of any significance, because the essential question before this Court was not considered in either "ruling." See *Short v. United States,* pending No. 102-63 (Ct. Cl.); 65 I.D. 59, 64 (1958).

Finally, 18 U.S.C. § 1151 does not infer, as argued by the United States in its amicus brief, that the reservation status of an area is not to be terminated even though Indian villages and trust allotments in the area continue under federal jurisdiction.

ARGUMENT

1. The Language of the 1892 Act Shows That the Reservation Status of the Former Klamath River Reservation Was Terminated Thereby.

The 1892 act provided that the lands of the former Klamath River Reservation were to be opened for settlement, entry and purchase under the homestead laws, and the laws authorizing the sale of mineral, stone and timber lands. Indians located on these lands were to be allowed to secure allotments held in trust by the United States, and to convert the allotments to fee patents after the trusteeship period had expired.

A careful reading of the 1892 act strongly suggests that Congress intended to discontinue the reservation status of these lands. The fact that the lands were to be opened up for settlement and sale by homesteaders strongly militates against a continuation of such reservation status. The lands of an Indian reservation are normally reserved from sale. As the Supreme Court declared in *United States v. Celestine,* 215 U.S. 278, 285 (1909), in defining an Indian "reservation",

> "The word is used in the land law to describe any body of land, large or small, which Congress has reserved

> from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, . . ."

For instance, the 1876 proclamation creating the Hoopa Valley Indian Reservation provided that the lands thereon are "withdrawn from public sale, and set apart for Indian purposes." 13 Stat 39. The 1892 act, by opening up the lands of the former Klamath River Reservation for settlement and sale, created an effect opposite to that of the proclamation on the lower 20 miles of the Klamath River. Although the sale and settlement of these lands does not conclusively establish that the area is no longer a reservation (see *Seymour v. Superintendent,* 368 U.S. 351 (1962)), the *Celestine* language suggests that such factors strongly lead toward that conclusion. See *De Marrias v. State of South Dakota,* 206 F.Supp. 549 (D.S.D. 1962), *aff'd* 319 F.2d 845 (8th Cir. 1963).

Other provisions in the 1892 act promote a similar conclusion. The act enables the Secretary of the Interior to "reserve" lands in the old Klamath River Reservation from sale and settlement. This provision appears to authorize the creation of a smaller reservation or reservations on the lands of the old reservation. This infers that only the specific area or areas so designated by the Secretary are to acquire reservation status, and that the reservation is not to extend beyond these areas.

The 1892 act also provides that allotments to the Indians are to be made under the General Allotment Act of 1887 (25 U.S.C. § 331 *et seq.*). This Court has previously held that this latter act reflected a congressional "policy of assimilating the Indians through dissolution of tribal governments and

the compulsory individualization of Indian land," and that the allotment was intended to "lessen the difficulty of the period of transition." See *Board of County Comm'rs v. Seber*, 318 U.S. 705, 716 (1943); see also *Poafpybitty et al. v. Skelly Oil Co. et al.*, 390 U.S. 365, 369 (1968); *Hopkins v. United States*, 414 F. 2d 464, 467 (9th Cir. 1969).[1] The allotment provision in the 1892 act was thus intended to steer the Indians away from their dependence on the reservation. Although such a provision does not conclusively indicate that the reservation itself is to be terminated (see *United States v. Celestine, supra* at 287), the provision, in the context of other provisions opening up the lands for settlement and sale, suggests an overall congressional policy to terminate the reservation status of the area.

II. The Legislative History Surrounding the 1892 Act Reveals That Congress Intended to Discontinue the Former Klamath River Reservation.

A. Analysis of Legislative History.

The legislative history surrounding the 1892 act even more clearly reveals the congressional purpose to discontinue the reservation status of the old Klamath River Reservation. The act was based on a bill introduced into the House of Representatives, H.R. 38. The bill was accompanied by a House report, Report No. 161. This report stated in part,

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1. It should be noted that this assimilation policy was largely changed by the Indian Reorganization Act of 1934 (48 Stat. 984, 18 U.S.C. § 461 *et seq.*), although the original policy was partially restored in 1953. See H.R. Con. Res. 108, 83d Cong., 1st Sess., 99 Cong. Rec. 10815 (1953); 42 U.S.C. L. Rev. 101, 108 (1968). But such subsequent legislative history cannot, of course, affect the congressional intent respecting the enactment of 1892. Cf. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

"The land referred to in the bill under consideration was set apart as an Indian reservation by an Executive order dated November 16, 1855. *It has not, in fact, been used by the Government as a reservation since the winter of 1861-62.*

"*[T]his reservation, under the provisions of the act of Congress just referred to, became abandoned in law, as it has been in fact, since the winter of 1861-62....*

"*As this land does not constitute an Indian reservation, and has not been used as such for about twenty-eight years,* there does not appear to be any reasonable objection to the passage of the present bill....

"*[T]his bill simply proposes that the land formerly set apart as a reservation, but now abandoned as above stated, shall be disposed of, as are other lands of the same class or quality, under the general laws of the United States,* giving to those who have settled upon them in good faith the prior right to enter that portion upon which settlement has been made.

"The few Indians now on this tract, variously estimated to be from fifty to one hundred in number, occupy small villages at or near the mouth of Klamath River....

"These Indians have not, *since the abandonment of this reservation,* been in any manner cared for, aided or instructed in the ways of civilization by the Government. This duty the Government may hereafter desire to perform, and to this end, and as a matter of justice to these Indians and their children, we think the proceeds to be derived from the sale of these lands should constitute a fund to be used for their removal, maintenance, and education, when in the judgment of the Secretary of the Interior their interests require an expenditure for such purpose." H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892). (Emphasis added.)

The bill was originally considered in the House. The bill's spokesman, Representative Geary, stated during the House debates, in urging the bill's passage,

> "The land embraced in this bill was originally an Indian reservation. *In 1861 it was abandoned, and never since has been used for that purpose. Since 1868 it has been occupied by settlers,* and this merely authorizes the Land Department to enable them to acquire title to the land which they occupy. . . .
>
> "*All the land in this reservation has been taken up by settlers. . . . The land is all occupied,* and the settlers have filed their claims, but the Land Department cannot take action on them until Congress passes this act." 23 Cong. Rec. 1598-99 (1892). (Emphasis added.)

After passage in the House, the bill was sent to the Senate. The spokesman for the bill in the Senate, Senator Felton, declared during the senate debate,

> "The Klamath Indian Reservation was set apart by a proclamation of the president some twenty years ago, I think. . . . *It never has been used as an Indian reservation.* . . .
>
> "There is an Indian reservation within 20 miles of the river, where these Indians can go if they want to do so. The number is variously estimated at from 40 to 60 Indians. . . .
>
> "The bill makes provision for them to select allotments in severalty; and if they have Indian villages, which they have not, it allows them to retain those, and it gives them a year's time within which to make selections. . . .
>
> "*There are a great many settlers upon that land. It is not practically an Indian reservation. It never has been used for that purpose. The provisions of the bill open the land to settlers* after providing, as I stated before, in regard to the Indians, and lands more valuable for timber or mineral deposits shall be entered

> under the timber act and the mineral land laws. . . . A few of these Indians live at the mouth of the river. . . ." 23 Cong. Rec. 3918-19 (1892). (Emphasis added.)

Thus, it is eminently clear that Congress, in passing the bill, did not expect that the lands of the former Klamath River Reservation should continue to have reservation status. Indeed, Congress did not even regard these lands as constituting a *de facto* reservation prior to the bill's passage. Based on these legislative statements, Congress understood that the reservation was "abandoned", that the land thereon "does not constitute an Indian reservation," and that it "has never been used for that purpose" for many years. This history explains the reference in the first sentence of the 1892 act to lands in "what *was* [the] Klamath River Reservation." (Emphasis added.) Although this reference is capable of conflicting inferences, the most obvious inference, given similar references in this legislative history, is that Congress no longer regarded the reservation as in existence.

The legal status of the lands on the old Klamath River Reservation site prior to 1892 is not important, of course. What is important is that the congressional understanding of the *de facto* situation at this site explains the intent of Congress in passing the 1892 act. The act was not primarily intended, as contended by the petitioner, to provide for the sale of "parcels" of land which were "surplus" to the Indians' needs. Brief for the Petitioner (hereinafter "Petitioner"), 19. Rather, "most" of these lands were already in the possession of non-Indian settlers, and the "few" Indians in the area were located in "small villages" at the mouth of the Klamath River. Obviously the purpose of the act was to open up most of the lands in this area for home-

stead settlement, and to allow such settlers to gain a fee patent in their lands; the Indians were to be given allotments which could similarly be converted into fee patents. 25 U.S.C. § 348.

The old reservation area no longer functioned as a reservation, Congress was assured, as the "former" reservation had been, and remained, "abandoned." Such assurances were apparently vital to the bill's passage, as Congress apparently was not inclined to approve a bill which would allow a flood of homesteaders to intrude upon lands which Congress wanted to continue as a reservation; such an intrusion might irreparably disrupt the traditional life patterns of the Indians on the reservation. But Congress approved the bill apparently because it did not expect for these lands to continue as a reservation, because it did not intend to preserve the traditional forms of reservation life in this area. It is significant that, as noted by the U. S. Department of the Interior, many of the Indians left this area after passage of the 1892 act and "were relocated on the connecting strip and elsewhere, and the Klamath River Tribe became widely scattered" (65 I.D. 59, 64 (1958)); given the legislative history behind the act, this result was surely not unintended by Congress. Congress obviously did not regard this result as "unconscionable," as the petitioner asserts it to be (Petitioner, 27), because ample provision was made in the act for the needs of the Indians. But Congress obviously felt that their needs did not require a preservation of the old reservation, or a continuing segregation of the Indians from those in the world beyond the reservation. The petitioner may oppose this congressional policy, but this Court is bound to respect it.

The practical effect of the 1892 act was to bring to a halt any federal supervision of most of the lands of the former

Klamath River Reservation, since most of these lands were now in the hands of the homesteaders. Thus, most of these lands ceased to function as a reservation, if they were so functioning before. As a California appellate court declared in 1966, the old reservation, "for all practical purposes, almost immediately lost its identity as part of the Hoopa Valley Reservation" after the 1892 act. See *Elser v. Gill Net No. One*, 246 Cal. App. 2d 30, 34 (1966). The area lost its resemblance to the neighboring extension located on the upper 20 miles of the Klamath River, where homesteaders continued to be excluded and where the land continued to be used for traditional reservation purposes. Since the 1892 act discontinued these traditional reservation functions in the lower area, but continued them in the upper area, it is difficult to believe that Congress intended for both areas thereafter to be similarly classified as reservations.

At stake in this case are not only California's fishing laws, but also the rights of private landowners who received homestead patents following the passage of the 1892 act. If the old Klamath River Reservation were considered as still in existence, Indians would apparently be allowed to trespass with impunity upon these privately-held lands in exercising their fishing, hunting and trapping rights.[2] In fact, the present case arises out of a situation in which the petitioner, Mattz, was fishing on privately-owned property.[3] But

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2. These privately-held lands include what is now the City of Klamath, and certain land owned by the State of California constituting a bridge across the Klamath River which is part of the California highway system.

3. Another case is presently pending in a federal district court in California, awaiting the outcome of this matter, in which a Yurok Indian who resides in San Francisco asserts the right to fish, during summer outings, on privately-owned property in the area encompassed by the former Klamath River Reservation, notwithstanding limitations imposed by California's fishing laws. See *Blake et al. v. Arnett et al.*, No. C-72-2140 (N.D. Cal.).

Congress, in passing the 1892 act, clearly did not intend to sanction this result. According to the House report, Congress intended to dispose of these lands to homesteaders "as are other lands of the same class or quality, under the general laws of the United States." H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892). Thus, Congress fully expected that these homesteaders would acquire an unrestricted fee patent entitling them to the same incidents of ownership as were vested in homesteaders elsewhere. The petitioner's position would drastically curtail some such incidents of ownership, however, and is thus clearly inconsistent with the announced purposes of the 1892 act.

B. Discussion by Petitioner and Amicus Curiae of Legislative History.

The petitioner and the United States, in its amicus curiae brief, seek to dismiss the inferences of the legislative history behind the 1892 act. Both argue that the purpose of the act was merely to protect settlers who had already settled on the lands of the old reservation at the time of the act. Petitioner, 16-17; Memorandum for the United States as Amicus Curiae (hereinafter "United States"), 4-5. It is not clear how this argument supports their position, since most of the lands were already in the possession of such settlers at the time of the act. It should be noted, however, that their argument is based solely on the remarks of Senator Pettigrew in reporting the bill passed by the conference committee. *Ibid.* But Senator Pettigrew, in making these remarks, did not purport to explain the purpose of the act, but only purported to explain the purpose of a minor amendment made by the conference committee which protected the claim of existing settlers unless Indians had settled on their lands at least four months prior to the act. See 23 Cong. Rec. 4245 (1892).

The petitioner also points out that a provision in the original House bill directed that proceeds from land sales would be used to support the removal of the Indians from the old reservation site, and that the Senate deleted the removal provision. Petitioner, 17. However, the bill in its original form did not require the removal of the Indians, but rather provided that the Secretary of the Interior could "reserve" Indian villages and settlements from lands sold to the homesteaders. See 23 Cong. Rec. 1599 (1892). After the 1892 act was passed, many of the Indians were relocated on other reservations anyway (65 I.D. 59, 64 (1958)), and it can hardly be said that the Senate intended for the act to avoid this result.

The petitioner also notes that the Senate amended the House bill to provide for allotments to the Indians. Petitioner, 17. It is not clear how this fact supports his position, in light of the fact, as urged above, that the allotment provision was intended to steer the Indians away from their dependency on reservation life. But it is sufficient to observe that the Senate amendment was already in effect at the time of the above-quoted Senate debate, and it is clear from this debate that the intent and understanding of the Senate was the same as that of the House.

Finally, the petitioner argues that the congressional references to a "former" and "abandoned" reservation were a reference to the old Klamath River Reservation, not to the lower extension of the Hoopa Valley reservation. Petitioner, 17-18. Since these reservations were the same, this is only a semantical argument. Moreover, it is amply refuted by the repeated congressional emphasis of the fact that the area "has never been used" as a reservation for many years, and that the old reservation was abandoned in law

"as it has been in fact." Congress thus expressed its view that, regardless of the area's name or its legal classification, it was not a *de facto* reservation in 1892, and should not be used for reservation purposes thereafter.

Clearly the 1892 act is inconsistent with a continuation of the reservation status of this area, and the old reservation was intended to be thereby terminated.

III. The Present Case Is Distinguishable From That Before the Seymour Court.

The petitioner cites the decision of the Supreme Court in *Seymour v. Superintendent,* 368 U.S. 351 (1962), to support its position that the 1892 act did not terminate the old Klamath River Reservation. In that case, Congress had passed legislation in 1892 which, according to the Court, terminated the reservation status of the northern half of the Colville Indian Reservation in Washington. 27 Stat. 62. The southern half of the reservation was expressly unaffected by the legislation. In 1906, Congress passed additional legislation which gave allotments to Indians "belonging to or having tribal relations on" the southern half of the diminished reservation, and provided that "surplus lands" thereon were to be opened to settlement and entry under the homestead and mining laws. 34 Stat. 80. The *Seymour* Court held that the 1906 act did not discontinue the reservation status of the southern half. Therefore, urges the petitioner, the same result should follow here.

However, the *Seymour* Court did not rule that, as a matter of law, a congressional act does not terminate a reservation if the act opens up the reservation for homestead settlement and provides trust allotments to the Indians. To the contrary, the Court did not rely on these facts as a basis for its decision; this suggests, as urged above, that these

facts militate towards the opposite conclusion. Instead, the Court based its decision on other terminological signals contained in this and later acts. Specifically, the Court concluded that the 1906 act did not terminate the reservation because (1) the 1906 act repeatedly referred to the "diminished Colville Indian Reservation" in a manner suggesting that the reservation, as so diminished, was to continue, (2) the 1906 act failed to provide, as had the 1892 Colville act,[4] for restoration of lands to the "public domain," (3) the 1906 act provided that proceeds of the land sales would be used for the Indians' benefit, and (4) subsequent legislation shows a consistent congressional understanding that this area continued to have reservation status.

The major distinction between this case and the *Seymour* case consists of an additional factor not present in *Seymour,* that is a legislative historical record clearly showing that Congress did not intend for the reservation status of the area to survive the act. This record outweighs all the other facts relied on by the *Seymour* Court in evaluating the mind of Congress. If such a record had been present in *Seymour,* the Court likely would have reached a different result.

A. Comparison of Seymour and This Case.

Aside from the inferences of the legislative historical record, the facts relied on by the *Seymour* Court are distinguishable from those present here. The Court particularly noted that the 1906 Colville act repeatedly referred to

4. For purposes of differentiation, the 1892 act relating to the former Klamath River Reservation will sometimes be referred to as the "1892 Klamath River act," the 1892 act relating to the northern half of the Colville reservation as the "1892 Colville act," and the 1906 act as the "1906 Colville act."

the "diminished Colville Indian Reservation," thus suggesting that Congress intended for the reservation to continue. 368 U.S. at 355. No similar language is contained in the 1892 Klamath River act; to the contrary, the latter act referred to lands "in what *was* [the] Klamath River Reservation," thus suggesting that this area was not to continue as a reservation. (Emphasis added.) Also, the 1892 Klamath River act repeatedly referred to "land" or "lands" affected by the act, thus seeming to avoid the use of the word "reservation."[5] For instance, the act directed that proceeds from land sales were to be used for the benefit of Indians on the "lands" affected by the act, whereas the 1906 Colville act directed that such proceeds were to be used for the benefit of Indians on the "Colville Indian Reservation."

Additionally, the emphases of the 1906 Colville act and the 1892 Klamath River act are entirely different. The 1906 Colville act provided at the outset for allotments to the Indians, and then provided for sale of "unallotted" lands to non-Indian settlers; the unallotted lands were described in the act as "surplus." Conversely, the 1892 Klamath River act, at the outset, provided for sale of "*all* lands" to such settlers, and subsequently set forth exceptions to this general proposition in providing for Indian allotments; nowhere in the act were the lands available to the settlers described as "surplus." (Emphasis added.) This different emphasis in the acts shows that the primary purpose of the 1892 Klamath River act, to a degree not present in the 1906

5. The 1892 Klamath River act made a single reference to Indians "now located on said reservation," but this phrase merely referred back to the earlier reference in the act to "lands embraced in what *was* [the] Klamath River Reservation." The use of the past tense in the latter phrase indicates that the former phrase was not intended to imply that these lands should continue to be regarded as a reservation.

Colville act, was to provide for homestead settlement of the area.

B. The "Public Domain".

The *Seymour* Court also noted that the 1906 Colville act, unlike the 1892 Colville act, failed to provide that lands sold to homesteaders were restored to the "public domain." 368 U.S. at 355. This phrase was similarly absent from the 1892 Klamath River act. However, the *effect* of the 1892 Klamath River act was to restore these lands to the public domain. The above-quoted legislative history shows that the lands opened up for settlement were to be "disposed of, as are other lands of the same class or quality, under the general laws of the United States" (H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892)); thus, under the homestead laws, the settlers acquired a fee title to these lands, which, as noted above, consisted of "most" of the lands of the former reservation. Therefore, whatever the choice of language, these lands were given over to private ownership, and were effectively restored to the public domain. It may thus be concluded that Congress did not insert the "public domain" phrase in the 1892 Klamath River act not because of its potential effect on the area's reservation status, but because of its redundancy.

That the effect of the 1892 Klamath River act was to restore the homesteaded lands to the public domain has been conceded by the United States in another proceeding. In *Short v. United States,* No. 102-63, a case pending in the U.S. Court of Claims, Ramsey Clark, then Assistant Attorney General for the United States, filed a brief in support of the United States' motion to dismiss for lack of jurisdiction. The brief stated, at page 3,

> "The Act of June 17, 1892, 27 Stat. 52, *restored the Klamath River Reservation to the public domain* after first authorizing allotments to Indians residing thereon and authorizing the creation of Indian villages. As a result of this Act, *no tribal lands remain on the Klamath River Reservation,* except the Indian villages." (Emphasis added.)[6]

This statement refutes the underlying basis for the amicus position asserted by the United States herein, and indeed shows that the United States formerly considered the old Klamath River Reservation as no longer in existence.

Above all, it should be remembered that the *Seymour* Court did not regard the "public domain" phrase as a necessary word of art in the termination of an Indian reservation. Certainly there is no indication that Congress has ever so viewed the phrase. Rather, the phrase is merely one manifestation of the congressional intent, and the legislative historical record in this case is another manifestation which should be heavily considered by this Court.

C. Proceeds to the Indians.

The *Seymour* Court mentioned other facts in support of its decision, facts which are clearly less important than those discussed above. For instance, the Court noted that the proceeds of the land sales were to be deposited in the U. S. Treasury for the use of Indians remaining on the reservation. This procedure is essentially similar to the disposition of such proceeds under the 1892 Klamath River act. But it is also largely similar to the procedure for disposing of such proceeds under the 1892 Colville act; this latter act provided that such proceeds should be set aside in the U. S. Treasury, and that, although Congress could ultimately

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6. A copy of this brief has been filed with the Clerk of the Supreme Court, and another copy has been provided to the petitioner.

appropriate the proceeds for the public use, the proceeds in the meantime were to be used for the benefit of the Indians. Since the *Seymour* Court held that this latter enactment effectively dissolved the northern half of the Colville reservation, it is apparent that the use of such proceeds for the Indians' benefit is a fact that, although subject to consideration, is not entitled to major significance.

D. Legislation Subsequent to 1892.

The *Seymour* Court also noted that, beginning 10 years after the 1906 Colville act, in 1916, legislation enacted by Congress frequently referred to the diminished Colville reservation in a manner suggesting that the reservation was to continue in effect.[7] But the only congressional references cited by the petitioner relating to the Klamath River Reservation consist of enactments in 1942 and 1958. See 56 Stat. 1081, 25 U.S.C.A. § 348a; 72 Stat. 121. This Court has noted, as the petitioner has conceded (Petitioner, 19, n. 8), that subsequent legislation is entitled to little weight in construing prior enactments. *United States v. Southwestern Cable Co.,* 392 U.S. 157, 170 (1968); see *United States v. Wise,* 370 U.S. 405 (1962). This is especially true where, as here, the later act was passed at least 50 years after the earlier act.

Also, it is not clear that Congress regarded the former Klamath River Reservation as in existence at the time of the passage of the 1958 enactment. Under this enactment, a small area on the old reservation was "restored" to tribal ownership, and such lands were "added to and made a part of the existing reservations." 72 Stat. 121. If the old reser-

7. The Court cited eight such references. See 368 U.S. at p. 356, n. 12.

vation were still in existence in 1958, such lands would already be a part of the reservation and there would be no necessity to "add [such lands] to" the reservation.

Moreover, the 1958 enactment was passed after the 1953 legislation giving California authority over certain offenses committed by Indians in "Indian country" (18 U.S.C. § 1162), and Congress would undoubtedly have provided a clearer expression of its intent if it thereby intended to deprive California of authority to enforce its fishing laws in this area. The 1942 legislation, which reimposed federal trusteeship over certain allotments, merely referred to the old reservation in identifying the area in which the allotments were located. Little signifiicance should be attached to either enactment in determining whether Congress intended to terminate the reservation in 1892.

E. Comparison of the Two 1892 Acts.

Perhaps the differences between this case and the *Seymour* case can be illuminated more clearly by focusing on the 1892 Colville act, which the *Seymour* Court held to have discontinued the reservation status of the northern half of the Colville reservation. That act is virtually identical to the 1892 Klamath River Act. Both acts provided for entry and settlement of unallotted lands under the homestead laws. The 1892 Colville act provided that these lands should be disposed of "under the general laws applicable to the disposition of public lands;" although this language was absent from the 1892 Klamath River act, similar language was inserted in the House report which explained the latter act. See H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892). Both acts authorized selected lands to be "reserved" for the Indians' benefit from the land made available to home-

steaders. Both provided for allotments to Indians "residing" on the lands; by way of contrast, the 1906 Colville act provided for allotments to Indians "belonging to or having tribal relations" on the reservation, not just to those residing on the land. Both acts provided that proceeds from the disposition of these lands would be used for the Indians' benefit, although the 1892 Colville act reserved the right of Congress to eventually use these proceeds for the public benefit. The only essential difference between the acts consists of the absence of the "public domain" phrase in the 1892 Klamath River act; but as noted earlier, the effect of this latter act was to restore most of the lands to the public domain and thus the phrase would have been redundant, especially in view of the legislative history behind the act. Both 1892 acts were passed by the same Congress, the Fifty-Ninth; that the same Congress passed two acts with virtually identical effects, within two weeks of each other, strongly indicates that both acts were similarly intended to terminate the reservation status of the affected area.

At the very least, the *Seymour* Court's construction of the 1892 Colville act refutes the petitioner's contention that Indian reservations are not terminated except by language to the effect that the reservation is "terminated" or "discontinued" (Petitioner, 11), and shows that Congress' intent must occasionally be examined in order to determine the results of its work. Other federal courts have also considered the effect, in addition to the language, of laws or treaties in order to determine whether a reservation was meant to be discontinued. See, *e.g., Tooisgah v. United States,* 186 F.2d 93 (10th Cir. 1950); *Ellis v. Page,* 351 F.2d 250 (10th Cir. 1965); *De Marrias v. State of South Dakota,* 206 F.Supp. 549 (D.S.D. 1962), *aff'd* 319 F.2d 845 (8th Cir. 1963); *United States v. La Plant,* 200 Fed. 92 (D.S.D. 1911).

IV. The Federal "Rulings" Cited by the Petitioner Have No Significance in Interpreting the 1892 Act.

The petitioner has referred to two federal "rulings," consisting of a 1972 opinion of the U. S. Court of Claims and a 1958 opinion of the U. S. Department of the Interior, which purportedly support his position. See Petitioner, 22-24; *Short v. United States,* No. 102-63 (Ct. Cl.); 65 I.D. 59 (1958). Both opinions are of fairly recent vintage, and thus have no historical significance in explaining the congressional intent behind the 1892 act. Moreover, both opinions were concerned with questions other than that presented here, and in neither matter did an interested party apparently make a presentation to the effect that the old Klamath River Reservation was no longer a reservation.

In *Short,* the trial commissioner merely issued a recommended opinion for adoption by the court, and the court has apparently not yet adopted the opinion. Additionally, the trial commissioner's opinion contains neither a holding nor dictum that the reservation status of the area was not terminated, but merely assumes this to be the case; this seems an unhealthy assumption in view of Ramsey Clark's brief submitted to the commissioner, discussed above, which concludes that the 1892 Klamath River act restored the reservation to the "public domain."

The opinion of the Department of the Interior fleetingly notes that the former Klamath River Reservation is "technically" a part of the Hoopa Valley reservation. 65 I.D. at 64. However, no reasons are offered in support of this brief statement. The statement seems impeached by the very facts presented in the opinion, since the opinion also states that the 1892 act "discontinued the Klamath River Reservation as such," and that thereafter "Indians who removed from

the Klamath River Reservation were relocated on the connecting strip and elsewhere, and the Klamath River tribe became widely scattered." *Ibid.* Clearly neither of these opinions are helpful in supporting the petitioner's position. opinions are probative in determining the question before this Court.

V. A 1909 Map Issued by the Federal Government Shows That the Area in Question Lost Its Reservation Status in 1892.

The executive branch of the federal government apparently took the position in 1909 that the 1892 act terminated the reservation status of the old Klamath River Reservation. President Theodore Roosevelt issued a proclamation that year which altered the boundaries of the Trinity National Forest in California. Two maps, compiled by the Forest Service of the U. S. Department of Agriculture, were affixed to the proclamation. See 35 Stat. 2243; Sen. Doc., vol. 27, 62d Cong., 2d Sess. (3 Indian Affairs: Laws and Treaties), 646-49 (1909).[8] These maps, particularly the small scale map (*id.* at 648), show the boundaries of an area covering the *upper* twenty miles of the Klamath River, which is described thereon as the "Hoopa Valley Indian Reservation." A boundary line is clearly drawn on the maps at the northern end of this extension of the Hoopa Valley reservation, which differentiates this extension from the *lower* twenty miles of the river. Hence, these maps unequivocally show that the reservation status accorded to the upper twenty miles of the river is not similarly accorded to the lower twenty miles. The maps are particularly significant in that, by virtue of their publication in 1909, they are

8. A copy of the proclamation and maps are attached hereto as Appendix A.

fairly contemporaneous with the 1892 act. Also, since the maps were incorporated in a presidential proclamation, they represent an expression by the highest executive officer in the federal government.

The petitioner has called the Court's attention to an earlier map of the U. S. Department of the Interior, dated 1892, which assertedly shows the area in question to be a reservation. Petitioner, 24; see Appendix to Sixty-First Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1892). But this map was clearly prepared prior to the 1892 act which we believe discontinued the reservation status of the area. This map shows the Colville reservation in Washington as including the old northern half of that reservation; but Congress passed the 1892 Colville act discontinuing the reservation status of the northern half of that reservation, within two weeks of the time that it passed the 1892 act relating to the Klamath River Reservation. Since the map was apparently prepared prior to the former act, it was apparently prepared prior to the latter act. Hence, this map is of no significance in illuminating Congress' intent in passing the 1892 Klamath River act.

The 1909 maps are not the only cartographic expressions by the federal government concerning the status of the old Klamath River Reservation. To the contrary, the U. S. Geological Survey, a branch of the Department of the Interior, has published many maps which similarly show a boundary line excluding the lower twenty miles of the Klamath River from the extension of the Hoopa Valley reservation.[9] The

9. A copy of the relevant part of one such Geological Survey map, published in 1970, is attached hereto as Appendix B. The original of this map, and the original maps referred to below as Appendices C and D, and the affidavits of the appropriate federal custodians certifying the maps to be official records, have been filed with the Clerk of the Supreme Court.

Geological Survey maintains and periodically updates official maps, referred to as the quadrangle series, which are the basis for the other maps which it compiles; the quadrangle map for the area in question, dated 1952, contains a boundary line for the Hoopa Valley reservation extension which clearly excludes the lower twenty miles from the extension.[10] Also, the U. S. Forest Service, a branch of the Department of Agriculture, published a map in 1972 which excludes this area from the reservation extension.[11]

The petitioner has cited a 1971 map of the U. S. Bureau of Indian Affairs, and the map of the U. S. Department of the Interior published in the National Atlas in 1970, which show the boundary of the reservation extension as including the lower twenty miles of the river. Petitioner, 25. It might be well to disregard these maps in view of the fact that they were published after the pending matter was filed, since certainly the Department of the Interior cannot cartographically lift itself up by its own bootstraps. At best, these maps merely show the Department's confusion concerning the status of the old Klamath River Reservation, and hence refute the petitioner's argument that the Department has maintained a consistent position concerning the reservation status of the area.

VI. 18 U.S.C. § 1151 Does Not Imply That the Old Klamath River Reservation Continued In Existence After 1892.

The United States, in its amicus brief, also makes reference to 18 U.S.C. § 1151, a 1948 enactment which defines "Indian country" to include a "reservation" . . . notwithstanding the issuance of any patent." United States, 7-8.

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10. A copy of this quadrangle map is attached hereto as Appendix C.

11. A copy of the relevant part of the Forest Service map is attached hereto as Appendix D.

Citing the *Seymour* case, the United States argues that the quoted language was intended to prevent a checkerboard of jurisdictions, and thus that the language would be meaningless if the opening up of a reservation to settlement terminated the reservation status of the area. However, the *Seymour* Court only held that, *once a reservation is determined to exist,* section 1151 requires all lands—whether patented or not—to be included as part of the reservation, in order to avoid a jurisdictional checkerboard. But the Court carefully avoided relying on section 1151 in making its initial determination whether the reservation itself was in existence, and instead looked to the congressional intent surrounding the relevant legislation. The United States has either misread or ignored the basic distinction which the *Seymour* Court itself made in interpreting section 1151.

There are two possible reasons for the distinction made by the *Seymour* Court in interpreting section 1151. First, the Court undoubtedly realized that a 1948 congressional enactment could not change the congressional intent surrounding a 1906 enactment. Secondly, and more importantly, section 1151 only provides that, if a reservation is created, all lands therein shall be considered a part of the reservation in order to avoid the unnecessary creation of federal enclaves within areas regulated by the state; it does not provide that, if a reservation is terminated, such federal enclaves shall be avoided. To phrase the proposition differently, the section prevents the creation of state enclaves on reservation lands, not the creation of federal enclaves on non-reservation lands. In fact, the section differentiates, in subdivisions (a), (b) and (c), between a "reservation," "dependent Indian communities" and "trust allotments"; this differentiation shows that Indian villages or trust allot-

ments can be located on non-reservation lands, a situation which necessarily results in the creation of federal enclaves on state-regulated lands. Also, the General Allotment Act of 1887 authorized trust allotments to be created on non-reservation lands (25 U.S.C. § 334), and thus also results in the creation of such federal enclaves. These provisions are based on the premise that Congress, if it wishes, can return reservation lands to the states, and necessarily creates federal enclaves with respect to any areas thereon that it sets aside as Indain villages or trust allotments. See *De Marrias v. State of South Dakota,* 206 F.Supp. 549, 553 (D.S.D. 1962), aff'd 319 F.2d 845 (8th Cir. 1963). When the northern half of the Colville reservation was terminated in 1892, for instance, the Indian villages and trust allotments thereon became federal islands within the jurisdictional sea of Washington. This result merely recognizes that, under certain circumstances, a state's interest in exercising its normal governmental functions over lands within the state, such as homesteaded lands, outweighs the jurisdictional inconvenience created by such federal enclaves. It would be unfair, for instance, to deprive California of its right to enforce its fishing laws to protect the Klamath River fishery merely because of the inconvenience of occasionally identifying the location of an Indian village or trust allotment. Certainly it was not the intent of Congress, in passing the 1892 act, to withhold this right from the state.

CONCLUSION

California has no interest in whittling away the rights of Indians which are secured under federal law. But we believe that the rights asserted by the petitioner are not, and since 1892 have not been, in existence. California's primary inter-

est in applying its fishing laws to the Indians is to protect the fishery, particularly the salmon fishery, in the Klamath River. Undisputed evidence at the trial shows that the use of gill nets, such as those used by the petitioner, are particularly harmful to salmon. Appendix, 27-28. The Court should be hesitant to exempt the Indians, or any other person, from the application of a state law designed to protect the general welfare by conserving a valuable fish resource. See *Puyallup Tribe v. Department of Fish and Game,* 391 U.S. 392, 399 (1968).

The petitioner has previously argued in this case that the white man poses a greater threat to the conservation of fisheries than the Indians, since the white man builds the dams, roads and other structures which threaten fish life. Perhaps the sheer force of the white man's progress makes this unhappily true; but in the situation before the Court, California is attempting, and for many years has successfully attempted, to conserve the Klamath River fishery by regulating the fishing activities of all, Indians and others, who take fish from the river.

In fact, California imposes far more stringent standards on non-Indians than on Indians with respect to fishing in the Klamath River. California recognizes the unique economic and cultural problems of the Yuroks who reside on the river, and has relaxed the fishing standards applicable to these Indians. Under California Fish and Game Code section 7155, adopted in 1957, the State Department of Fish and Game issues permits to Yurok Indians to fish along the Klamath River "for subsistence purposes only." Under the section, Yuroks may take fish at any time of the year, but only by hand dip nets or hook and line. Daily bag limits are imposed for salmon, trout and sturgeon, but not for other

types of fish. The Yuroks are not permitted to sell the fish taken, and thus are not permitted to become entrepreneurs at the expense of the fishery; it is doubtful if this result would follow if the area were held to be a reservation. See *Donahue v. Justice Court,* 15 Cal. App. 3d 557, 563 (1971).

California has made a genuine and long-standing effort to reconcile the competing needs of the Yuroks and the needs of the Klamath River fishery. The Court should decline to upset this reconciliation, and should respect California's efforts to protect this vital and irreplaceable resource. Certainly Congress did not intend in 1892 for this area to continue as a reservation. The Court should affirm the decision of the California appellate court.

Respectfully submitted,

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State of California

CARL BORONKAY
Assistant Attorney General

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Deputy Attorney General
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San Francisco, California 94102
Attorneys for Respondent

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

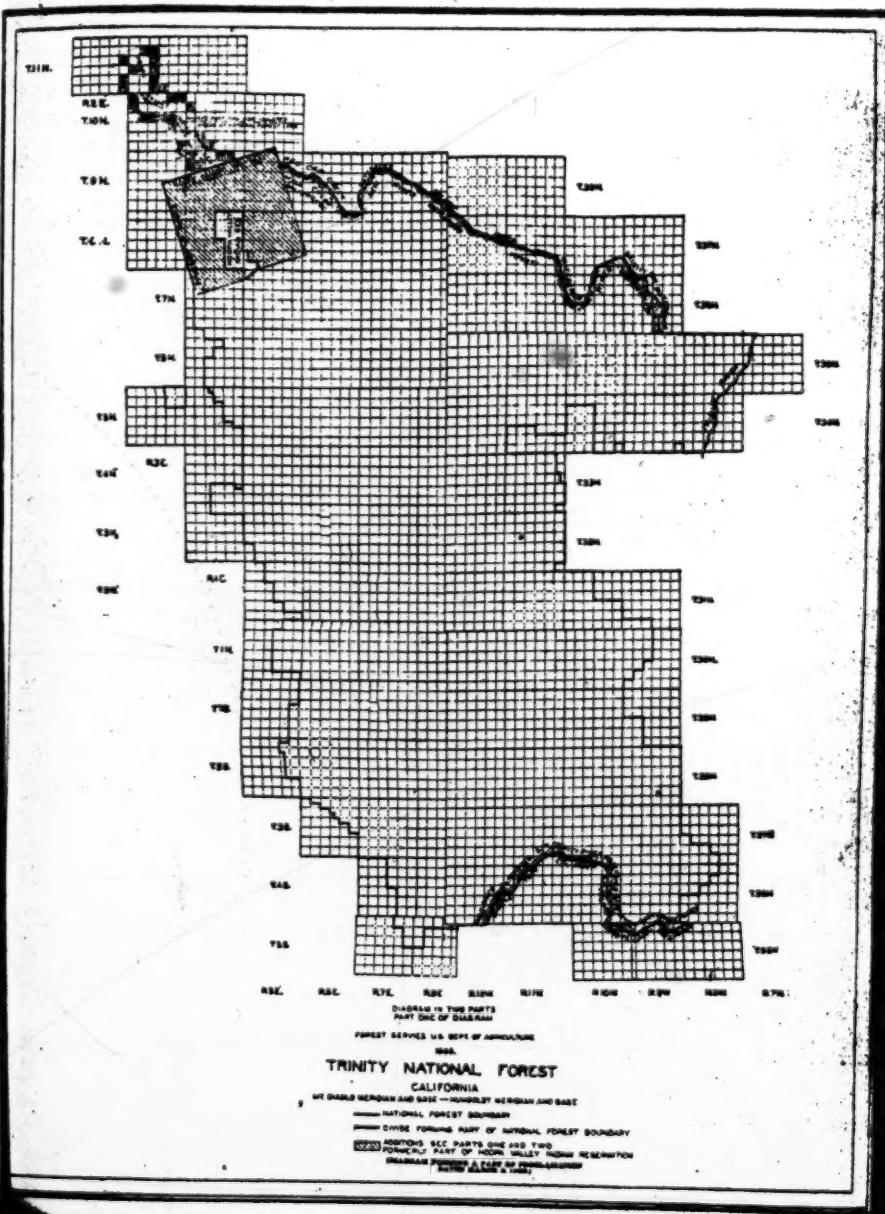
A PROCLAMATION

WHEREAS, an Executive Order dated July second, nineteen hundred and eight, changed the boundaries of the Trinity National Forest to embrace portions of the Trinity, Shasta, Klamath, and Stony Creek National Forests;

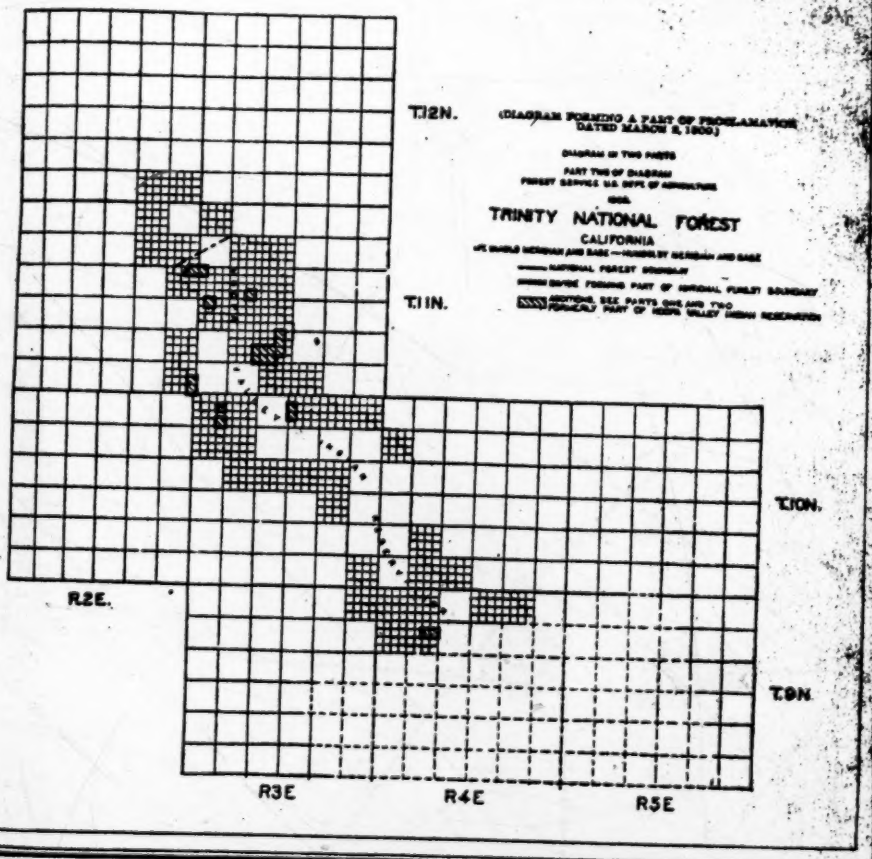
And whereas, it appears that the public good will be promoted by including in the Trinity National Forest certain lands within the State of California, shown on the diagram hereto attached and forming a part hereof, which are in part covered with timber, and which constitute a part of the Hoopa Valley Indian Reservation, established by Executive Order dated June twenty-third, eighteen hundred and seventy-six, and modified by subsequent Orders;

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by the Act of Congress, approved June fourth, eighteen hundred and ninety-seven, entitled, "An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen

hundred and ninety-eight, and for other purposes," do proclaim that the said lands are hereby added to the Trinity National Forest and that the boundaries of said National Forest are now as shown on the two parts of the said diagram, and such National Forest so enlarged



rights of the Secretary of the Interior and of the Commissioner of Indian Affairs, under existing laws, to allot to individual Indians any of such of the above described lands as were included in the said Hoopa Valley Indian Reservation by the said Executive Order modified as aforesaid; to use any of such lands or the timber thereon for Agency, school, or other tribal purposes; to permit the use of any of such lands for grazing purposes; to permit the free use by individual Indians of timber and stone from any of said lands necessary for domestic use upon their allotments; to dispose of the proceeds arising from grazing as provided for by law for other Indian



funds; and to dispose of the dead timber standing or fallen upon such lands; *Provided further*, that said powers and rights of the Secretary of the Interior and Commissioner of Indian Affairs or permittees under or through them or either of them, and of individual Indians, except as to allotments to such Indians, shall be subject to such rules and regulations as the Secretary of Agriculture may from time to time prescribe for the protection of the National Forest; and said powers and rights shall not be construed to apply to any land except such parts of said Hoopa Valley Indian Reservation as are included in the Forest by this proclamation, and all said powers and rights

except the rights of individual Indians and their heirs to hold and enjoy their allotments, shall cease and determine twenty-five years after the date hereof, and thereafter the occupancy and use of the unallotted parts of said lands shall in all respects be subject to the laws governing National Forests.

The withdrawal made by this proclamation shall, as to all lands which are at this date legally appropriated under the public land laws or reserved or used for Indian Agency, school, or church purposes, or reserved for any public purpose other than for Indian occupancy and use under such Executive Orders, be subject to, and shall not interfere with, or defeat legal rights under such appropriation, or prevent the use for such public purpose of lands so reserved, so long as such appropriation is legally maintained, or such reservation remains in force. Prior rights not affected.

This proclamation shall not prevent the settlement and entry of any lands heretofore opened to settlement and entry under the Act of Congress approved June eleventh, nineteen hundred and six, entitled, "An Act to provide for the entry of Agricultural lands within forest reserves." Agricultural lands, 34 Stat., 233.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this second day of March, in the year of our Lord one thousand nine hundred and nine, [SEAL] and of the Independence of the United States the one hundred and thirty-third

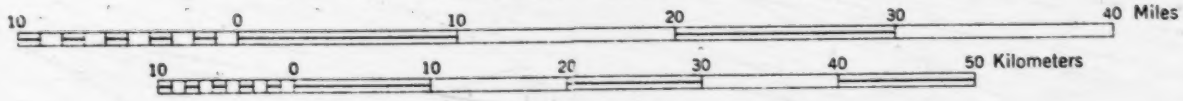
THEODORE ROOSEVELT

By the President:
ROBERT BACON
Secretary of State.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

STATE OF CALIFORNIA
NORTH HALF

Scale 1:500,000
1 inch equals approximately 8 miles



Contour interval 500 feet
Dotted line represents the 100-foot contour
Datum is mean sea level
Depth curves at 100-fathom interval
Datum is mean lower low water

Compiled, edited, and published by the Geological Survey. 1927 North American datum
Lambert conformal conic projection based on standard parallels 33° and 45°

LEGEND

- apital
- seat
- wn, or village
- led service airport
- p area shown for towns over 25,000 population
- boundary
- al park
- al wildlife refuge
- Interstate highway
- U. S. highway
- State highway
- Other principal roads
- National forest
- Indian reservation

SOURCE DATA

U. S. Dept. of the Interior-Geological Survey topographic maps
U. S. Dept. of the Army-Corps of Engineers topographic maps
Geological Society of America-Submarine topography of the Calif. coast, based in part on U. S. Coast & Geodetic Survey data
State of California-Dept of Water Resources maps

BASE MAP
WITH HIGHWAYS AND CONTOURS

POPULATION KEY

LOS ANGELES	more than 200,000
PASADENA	100,000 to 200,000
Concord	25,000 to 100,000
Redding	5,000 to 25,000
Bishop	less than 5,000

Population indicated by size of letters

FOR SALE BY U. S. GEOLOGICAL SURVEY, DENVER, COLORADO 80225 OR WASHINGTON, D. C. 20242
COMPILED IN 1968
EDITION OF 1970
HIGHWAYS CORRECTED TO 1969

APPENDIX "B"


DEL NORTE
DEL NORTE COAST REDWOODS STATE PARK
Requa
Klamath
Klamath Glen
PRAIRIE CREEK REDWOODS STATE PARK
Orick
Stone Lagoon
DRY LAGOON STATE PARK
Big Lagoon
BIG LAGOON RANCHERIA
Rodgers Pk
Schoolhouse Peak
Patricks Point
Redwood
Trinidad
Westhaven
Crannell
Fieldbrook
McKinleyville
Blue Lake
Arcata
Korbel
Bayside
Arcata Bay
STANDARD
Fickle Hill
Mad
Freshwater
Kneeland
Maple Creek
Berry Summit
Hoopa Mtn
Tip Top Ridge
HOOPA VALLEY
INDIAN RESERVATION
Little
River
North Fk
Maple Cr
Jacoby Cr
Prairie
1ST
C O A S T

MAP TO ACCOMPANY
MULTIPLE USE MANAGEMENT REVIEW
OF UNDEVELOPED ROADLESS AREAS IN

CALIFORNIA

SCALE 1" =APPROX. 16 MILES

1972

LEGEND

NATIONAL FORESTS

EXISTING WILDERNESSES, WILD RIVER, AND PRIMITIVE AREAS

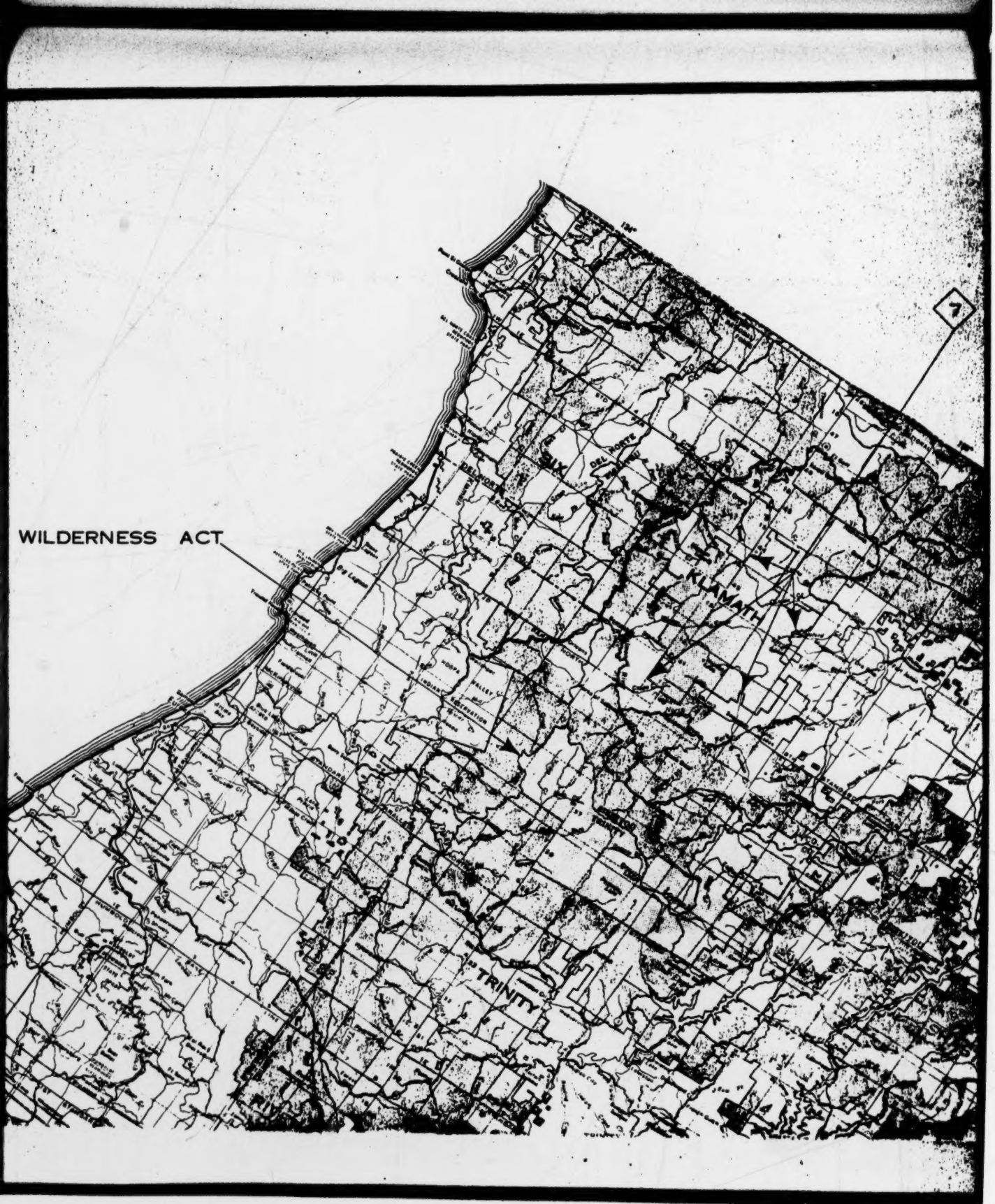
EXISTING NATIONAL PARKS, MONUMENTS, SEASHORES, RECREATION AREAS, WILDLIFE REFUGES AND STATE PARKS, MONUMENTS, RECREATION & WILDLIFE AREAS

CURRENT ROADLESS, UNDEVELOPED AREAS WITHIN THE NATIONAL FORESTS

TENTATIVE CANDIDATE STUDY AREAS

1	CUCAMONGA EXTENSION	ANGELES N. F.
2	SHEEP MTN.	ANGELES N. F.
3	LADEUX	ELDORADO N. F.
4	GOLDEN TROUT-GREY-MOSES	INYO & SEQUOIA N. F.
5	WHITE MOUNTAINS	INYO N. F.
6	ISHI	LASSEN N. F.
7	MARBLE MTN. REVISIONS	KLAMATH N. F.
8	SHINBONE	MENDOCINO N. F.
9	MT. SHASTA	SHASTA-TRINITY N. F.
10	CASTLE CRAGS	SHASTA-TRINITY N. F.
11	RED MTN.	SIX RIVERS N. F.
12	CARSON-ICEBERG	STANISLAUS N. F.
13	MOKELUMNE EXTENSION	STANISLAUS N. F.

APPENDIX "D"


WILDERNESS ACT
7
SIX
KLAMATH
TRINITY